MOHD AHMAD

v.

YANG DIPERTUA MAJLIS DAERAH JEMPOL, NEGERI SEMBILAN & ANOR.

FEDERAL COURT, MELAKA
CHONG SIEW FAI CJ (SABAH & SARAWAK)
PEH SWEE CHIN FCJ
MOHAMED DZAIDDIN FCJ
[CIVIL APPEAL NO: 01-49-94]
3 APRIL 1997

CONSTITUTIONAL LAW: *Public servants - Employees of local authorities - Whether holding public office - Contract of service - Employment of employee made subject to General Orders Chapter D - Effect - Local Government Act 1976 - Federal Constitution Arts. 132, 135*

ADMINISTRATIVE LAW: *Public servants - Dismissal - Of employee of local authority - Whether entitled to claim for reinstatement - Whether entitled to claim for declaration that dismissal was void and of no effect - Incorporation of General Orders Chapter D into contract of service - Effect - Whether employee holding a public office - Whether a public officer - Local Government Act 1976 - Federal Constitution Arts. 132, 135*

ADMINISTRATIVE LAW**:** *Public servants - Dismissal - Of employee of local authority - Proper relief - Whether could only claim damages for breach of contract of service - Rights of employee - Whether governed by ordinary contract of employment - Whether relationship one of master and servant*

The appellant was employed by the respondent Local Council as a market supervisor. The appellant's contract of service stated that his employment was subject *inter alia* to the General Orders of the Government, including the so called Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980, otherwise known as General Orders Chapter D.

In 1984, the appellant was absent from work for six consecutive days and was dismissed from his employment as a result. The appellant filed a suit against the respondent wherefore he sought for a declaration that his dismissal was void and of no effect, and further, for damages. The respondent applied to strike out the claim under O. 18 r. 19(1)(a), (b) and (d) Rules of the High Court 1980, and at the hearing thereof, raised a preliminary objection (i) that the appellant, being an employee appointed under the Local Government Act

1967, was not entitled to ask for reinstatement (ii) that the appellant had no right to ask for the declaration aforesaid because, by that declaration, he was in fact asking for reinstatement.

The learned Judge, acceding to the contention, and to the principle that Courts will not normally enforce a contract of service between master and servant, allowed the objection and consequently dismissed the claim of the appellant. The appellant appealed, and argued before the appellate Court that the incorporation of the General Orders Chapter D into his contract of service had made him a public officer in law, and not merely an employee or servant of the respondent, and as such, was entitled to the relief he was praying for.

Held:
Per Peh Swee Chin FCJ

[1] The principle is that the law will not specifically enforce a contract of service between master and servant and that the master has always the power to dismiss the servant in breach of such contract without any danger of being compelled to re-employ him.

[1a] Two categories of employees are however excepted from the above principle, namely (i) those permitted claimants/employees before the Industrial Court claiming for reinstatement, arrears of wages etc. on ground of unfair dismissal. The Industrial Relations Act 1967 had radically changed the common law with regard to these claimants/employees for the sake of promoting national economic interest and industrial harmony, and had conferred upon ordinary workmen benefits far beyond those that are available in the ordinary Court (ii) those holding public offices of the types described in Art. 132 of the Federal Constitution. These employees were afoorded special protection by Art. 135 of the Constitution, in that they could not be dismissed from office without being given a reasonable opportunity of being heard (among other things).

[2] It follows that, when the rights of parties are regulated or governed by an ordinary contract of employment, or where such rights are not modified or affected by any provisions of any statute, then, the fact that the dismissal of the employee is not in accordance with the procedure laid down in the contract does not prevent the dismissal from being effective to terminate the contract and the only remedy lies in damages. The employee cannot, in these circumstances, claim that the dismissal is void, as that would indicate that he was asking for reinstatement.

[3] Employees of local authorities are employed purely on contract basis. They are not therefore holders of public offices holding offices during the pleasure of the Yang Di-Pertuan Agong or the Ruler of any particular State. And except for those who had been seconded from the State Government or the Federal Government, they are not caught by Art. 132 of the Federal Constitution.

[3a] In the event, the claim for reinstatement available to a permitted claimant in an Industrial Court or to a holder of a public office as categorized under Art. 132 of the Federal Constitution is not available to the appellant. The principle aforementioned applies, and he is entitled to claim damages only if he can establish that his dismissal is in breach of his contract of service.

[3b] The respondent was right in its objection that the appellant could not claim the declarations that his dismissal was void. The learned Judge was right in upholding the objection, and was also correct when he held that it was not possible for the appellant to obtain reinstatement.

[4] The incorporation of the General Orders Chapter D into the appellant's contract of service does not have the legal effect of making him a holder of any such public office as categorized under Art. 132 of the Federal Constitution.

[5] This Court is however of the opinion that, in regard to the 'preliminary objection', there was no prior express agreement by the parties at the time it was raised that it would conclusively decide the whole case one way or another. That being so, in view of the express relief sought in the statement of claim, in particular the claim for damages for wrongful dismissal, the Court below has gone too far in dismissing wholly the claim of the appellant. The appellant's suit ought to be heard to determine whether his dismissal was wrongful, and if so, to assess damages, if any.

[Appeal allowed. Respondent's summons in chambers for striking out dismissed. Order of Court below set aside.]

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG-UNDANG PERLEMBAGAAN: *Pekerja-pekerja pihak berkuasa tempatan - Samada memegang jawatan awam - Kontrak perkhidmatan - Perkhidmatan tertakluk kepada Perintah-perintah Am Bab D - Kesan - Samada merupakan pegawai awam - Akta Kerajaan Tempatan 1976 - Perlembagaan Persekutuan Fasal 132, 135*

UNDANG-UNDANG PENTADBIRAN: *Pemecatan - Pekerja pihak berkuasa tempatan - Samada berhak untuk menuntut pengambilan semula - Samada berhak untuk menuntut pengisytiharan bahawa pemecatan batal dan tidak berkesan - Penggabungan Perintah-Perintah Am Bab D ke dalam kontrak perkhidmatan - Kesan - Samada pekerja memegang jawatan awam - Samada merupakan pegawai awam - Akta Kerajaan Tempatan 1976 - Perlembagaan Persekutuan Fasal 132, 135*

UNDANG-UNDANG PENTADBIRAN: *Pemecatan - Kakitangan pihak berkuasa tempatan - Relief yang wajar - Samada hanya boleh menuntut gantirugi atas kemungkiran kontrak perkhidmatan - Hak-hak pekerja - Samada dikuasai oleh kontrak perkhidmatan biasa - Samada perhubungan merupakan perhubungan majikan dan pekerja*

Perayu telah diambil bekerja oleh responden sebagai penyelia pasarnya. Kontrak perkhidmatan perayu menyatakan bahawa perkhidmatannya adalah tertakluk antara lainnya kepada Perintah-Perintah Am Kerajaan, termasuklah kepada Perintah-Perintah Am Pegawai-Pegawai Awam (Disiplin dan Tatatertib) (Bab D), yang juga dikenali sebagai Perintah-Perintah Am Bab D.

Dalam tahun 1984, perayu telah tidak hadir bekerja selama enam hari berturut-turut dan akibatnya telah dipecat daripada pekerjaannya. Perayu telah memfailkan tuntutan terhadap responden di mana beliau memohon untuk mendapatkan satu pengisytiharan bahawa pemecatan beliau adalah batal dan tidak mempunyai kesan, dan selanjutnya, untuk mendapatkan gantirugi. Responden memohon untuk membatalkan tuntutan itu di bawah A. 18 k. 19(1)(a),(b) dan (d) Kaedah-kaedah Mahkamah Tinggi 1980, dan di perbicaraan yang berikutan, telah membangkitkan bantahan awal (i) bahawa perayu, sebagai pekerja yang dilantik di bawah Akta Kerajaan Tempatan 1967, tidak berhak untuk meminta relif pengambilan semula (ii) bahawa perayu tidak berhak untuk meminta pengisytiharan sepertimana yang dipohonnya di atas kerana, dengan pengisytiharan itu, beliau pada hakikatnya memohon pengambilan semula.

Hakim yang bijaksana, yang akur kepada hujah responden, dan kepada prinsip bahawa Mahkamah secara kebiasaannya tidak akan menguatkuasakan sesuatu kontrak perkhidmatan antara majikan dan pekerja, telah membenarkan bantahan responden dan akibatnya telah menolak tuntutan perayu. Perayu merayu, dan berhujah di hadapan Mahkamah rayuan bahawa penggabungan Perintah-Perintah Am Bab D ke dalam kontrak perkhidmatannya telah menjadikannya seorang pegawai awam di sisi undang-undang, dan bukan hanya semata-mata seorang pekerja atau pengkhidmat responden, dan oleh yang demikian, adalah berhak kepada relif yang telah beliau pohon itu.

Diputuskan:
Oleh Peh Swee Chin HMP

[1] Prinsipnya adalah bahawa undang-undang tidak akan secara khususnya menguatkuasakan kontrak perkhidmatan antara majikan dan pekerjanya dan bahawa majikan adalah sentiasa mempunyai kuasa untuk memecat pekerjanya kerana kemungkiran kontrak perkhidmatan tanpa menghadapi apa-apa risiko untuk mengambilnyanya semula.

[1a] Dua kategori pekerja walaubagaimana pun adalah terkecuali daripada prinsip ini, iaitu (i) pihak-pihak menuntut/pekerja-pekerja yang dibenarkan di hadapan Mahkamah Perusahaan yang menuntut bagi pengambilan semula, tunggakan-tunggakan gaji dan lain-lain, atas alasan pemecatan yang tidak adil. Akta Mahkamah Perusahaan 1967 telah secara radikal mengubah common law berkaitan dengan pihak-pihak menuntut/ pekerja-pekerja yang sedemikian demi untuk mempertingkatkan kepentingan ekonomi negara dan keharmonian industri, dan telah menganugerahkan kepada pekerja-pekerja biasa faedah-faedah yang jauh melebihi faedah yang terdapat dalam Mahkamah biasa (ii) mereka-mereka yang memegang jawatan awam dari jenis yang diterangkan dalam Fasal 132 Perlembagaan Persekutuan, di mana perlindungan khas telah diberikan kepada mereka di bawah Fasal 135, iaitu mereka tidak boleh dipecat daripada jawatan tanpa diberikan peluang yang wajar untuk didengar (antara lain-lain perlindungan).

[2] Ianya mengikut, bahawa apabila hak pihak-pihak diatur atau dikuasai oleh satu kontrak perkhidmatan biasa, atau di mana hak yang sedemikian tidak diubahsuai atau terjejas oleh mana-mana peruntukan statut, maka, hakikat bahawa pemecatan pekerja itu adalah tidak menurut prosedur yang terkandung di dalam kontrak itu tidak menghalang keberkesanan pemecatan itu untuk menamatkan kontrak tersebut dan satu-satunya remedi hanyalah dalam bentuk gantirugi. Pekerja itu tidak boleh, dalam keadaan sedemikian, menuntut bahawa pemecatan itu adalah batal, kerana itu bermakna bahawa beliau memohon untuk pengambilan semula.

[3] Pekerja-pekerja pihak berkuasa tempatan diambil bekerja berdasarkan kontrak. Mereka dengan itu bukanlah pemegang-pemegang jawatan awam yang memegang jawatan menurut kehendak Yang di Pertuan Agong atau Pemerintah mana-mana Negeri. Dan kecuali mereka-mereka yang di pinjam daripada perkhidmatan Kerajaan Negeri atau Kerajaan Persekutuan, perkerja-pekerja ini adalah tidak termasuk atau terangkum dalam peruntukan Fasal 132 Perlembagaan Persekutuan.

[3a] Oleh yang demikian, tuntutan untuk pengambilan semula yang boleh dibuat oleh pihak menuntut yang dibenarkan dalam Mahkamah Perusahaan atau oleh pemegang jawatan awam yang dikategorikan di bawah Fasal 132 Perlembagaan Persekutuan adalah tidak terbuka kepada perayu. Prinsip yang tersebut di atas terpakai, dan beliau hanya berhak untuk menuntut gantirugi dan itu pun jika beliau boleh membuktikan bahawa pemecatannya itu melanggari kontrak perkhidmatannya.

[3b] Responden adalah betul dalam bantahannya bahawa perayu tidak boleh menuntut pengisytiharan bahawa pemecatannya adalah tak sah. Hakim yang bijaksana adalah betul dalam mempertahankan bantahan itu dan adalah juga betul apabila beliau memutuskan bahawa ianya tidak wajar bagi perayu untuk menuntut pengambilan semula.

[4] Penggabungan Perintah-Perintah Am Bab D ke dalam kontrak perkhidmatan perayu tidak mempunyai kesan undang-undang yang menjadikan beliau seorang pemegang mana-mana jawatan awam sepertimana yang dikategorikan di bawah Fasal 132 Perlembagaan Persekutuan.

[5] Walau bagaimana pun, berhubung dengan 'bantahan awal' di sini, Mahkamah berpendapat bahawa tidak terdapat perjanjian nyata yang terdahulu oleh pihak-pihak terbabit, pada waktu bantahan awal tersebut dibangkitkan, bahawa ianya akan memutuskan secara muktamad keseluruhan kes dengan apa cara sekalipun. Oleh yang demikian, memandangkan relif nyata yang dipohon dalam pernyataan tuntutan, khususnya tuntutan gantirugi bagi pemecatan secara salah, Mahkamah di bawah telah pergi terlalu jauh apabila menolak tuntutan perayu secara keseluruhannya. Guaman perayu seharusnya didengar bagi menentukan sama ada pemecatannya adalah salah, dan jika sedemikian, di nilai gantiruginya, jika ada.

[Rayuan dibenarkan. Saman dalam kamar responden untuk menolak ditolak. Perintah Mahkamah di bawah diketepikan.]

Cases referred to:

B. Surinder Singh Kanda v. Government of the Federation of Malaya [1962] 28 MLJ 169 PC ***(cit)***

Mahan Singh v. Government of Malaysia [1978] 2 MLJ 133 ***(cit)***

Ong Ah Chuan v. Public Prosecutor [1981] 1 MLJ 64 ***(refd)***

Quek Chek Yen v. Majlis Daerah Kulai [1986] 2 MLJ 290 ***(foll)***

Vine v. National Dock Labour Board [1957] AC 488 ***(refd)***

Barber v. Manchester Regional Hospital Board [1958] 1 All ER 323 ***(foll)***

Howard v. Pickford Tool Co. [1951] 1 KB 417 ***(refd)***

Legislation referred to:
Employment Protection (Consolidation) Act 1978, ss. 69-71
Federal Constitution, Arts. 132, 135
Industrial Relations Act 1967, s. 20
Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (d)
Trade Union and Labour Relations (Consolidation) Act 1992 [UK], s. 236

Other source referred to:
Federal Constitution of Malaysia - A Commentary [1986] CLJ 394, 395
Administrative Law, Prof. Wade, 7th Edn., p. 557
Halsbury's Laws of England, 4th Edn., Vol. 16, p. 369

[Appeal from High Court Seremban; Suit No: 21-34-90]

For the appellant - Christopher Fernando (Haresh Mahadevan with him); M/s. Aris Rizal Christopher Fernando & Co.
For the respondents - Mazlinda Makhzan (HC Yong with her); M/s. Ng Wook Woon, Andrew TC Saw & Co.

JUDGMENT

Peh Swee Chin FCJ:

This appeal concerns the claim by a local government employee against the Yang Di Pertua, Majlis Daerah Jempul, Negeri Sembilan and others for (a) a declaration that his dismissal by his employer as a market supervisor was void and of no effect and that he was still a market supervisor, and entitled to all salary and benefits; (b) an enquiry to determine the amount of his salary; (c) damages and (d) costs; the appellant being such employee (hereinafter called the Supervisor) and the 1st respondent, his employer, (hereinafter called the Local Council).

The complaint against the Supervisor was that he had been absent without leave from 12 September 1984 to 17 September 1984, and after some correspondence and enquiry between the parties, the Supervisor was ultimately dismissed, whereupon the Supervisor launched the civil suit concerned herein.

In the civil suit, the Local Council filed a summons under O. 18 r. 19(1)(a), (b) and (d) of the Rules of the High Court 1980 for the statement of claim to be struck out on the grounds that the statement of claim disclosed no reasonable cause of action; that it was frivolous or vexatious; or that it was an abuse of the process of the Court. It was allowed and the claim of the Supervisor was dismissed with costs, hence this appeal.

At the hearing of the summons in the Court below, learned Counsel for the Local Council then appearing adopted an unusual way of proceeding with the summons by raising "a preliminary objection" based primarily on the ground

that the Supervisor had no right to ask for the declarations that (a) that his dismissal was void and (b) that he still continued in his post. The learned Counsel was in effect objecting to the Supervisor's claim for reinstatement to the latter's former post from which he was dismissed. We, of course, would treat such "preliminary objection" as a misnomer for her submission in support of her application.

In point of fact, looking at the statement of claim, nowhere does it refer to the word "reinstatement" but in the second part of the declaratory relief sought, there is the prayer that the plaintiff "is still' a market supervisor and for the consequential relief as to salary, damages etc. Learned Counsel for the Local Council assumed the prayers mentioned as being synonymous with or equivalent to a prayer for a claim for reinstatement. Learned Counsel for the Supervisor, in answer to such submission, tacitly and completely accepted both as meaning the same thing.

In his submission, learned Counsel for the Supervisor submitted, *inter alia*, that his client was a public officer and that the usual 'General Orders" applicable to public officers were made expressly applicable to the Supervisor and were used in dismissing him. Further, the State Secretary of Negeri Sembilan wrote the "letter of dismissal" to the Supervisor, signing as chairman of the disciplinary committee. He cited, in particular, *B. Surinder Singh Kanda v. Government of the Federation of Malaya* [1962] 28 MLJ 169 PC. He submitted further that even if the Supervisor was not a public officer, he claimed the relief of reinstatement in any event.

On the other hand, learned Counsel for the Local Council submitted, *inter alia*, that the Supervisor was an employee (appointed) under the Local Government Act 1976 and the fact that the General Orders were adopted in this case did not make him a public officer. Such General Orders could be adopted.

A claim by an employee for reinstatement still has that ring of incongruity to make lawyers extremely wary, for they are always acutely aware of the principle that the law will not specifically enforce a contract without any danger of service between master and servant and that the master has always the power to dimiss him in breach of such contract without any danger of being asked or compelled to re-employ him, thus the only remedy left to the servant is to sue in damages. The principle is that the Court will not order specific performance of a contract of personal service.

Following the principle aforesaid, (hereafter the said principle), the logical result will be that a dismissed employee cannot claim any declaration that "his dismissal was void" and if he wants to cast his pleading in the form of a declaration, then he can claim a declaration, e.g., he was dismissed in breach

of the contract of service and that he claims damages for such breach. To claim that his dismissal was void would indicate that he wants to have his job back. It is therefore understandable and it was quite natural for learned Counsel to apply under O. 18 r. 19 of the Rules of the High Court 1980 to strike out the statement of claim for such reinstatement, with the statement of claim claiming a declaration that "he is still" market supervisor, with the clearest implication that his earlier dismissal is void or invalid.

It appears to us that to the said principle, there are two exceptions.

The first exception is a permitted claimant/employee before an Industrial Court, claiming reinstatement, arrears of wages etc. on ground of dismissal without just cause or excuse. Such a claimant can present his case after the Minister of Labour decides to refer his case to that Court when he thinks fit, see s. 20 of the Industrial Relations Act 1967. The said Act has, of course, statutorily and radically, changed the common law with regard to such permitted claimants/employees for the sake of promoting national economic interest, industrial peace and conferring upon ordinary workman benefits far beyond those that are available in the ordinary Court. Apart from the Industrial Relations Act 1967, there may be some other statutes which may modify the said principle, though not quite in a radical way like the said Act. It will be a matter of interpretation of the relevant provisions in such modifying statutes to find out in what precise ways the said principle has been modified.

The second exception is a holder of any public office of certain types. In Malaysia, fortunately for clarity or certainty, such public offices as spelt out or set out in Art. 132 of tie Federal Constitution are as follows. They are public offices in the armed forces, the judicial and legal service; the general, public service of Malaysia, the police force; the joint Federal and State public services; the education service; and finally the public service of each State. All holders of public offices abovementioned, except the public service of each State, hold office during the pleasure of the Yang di-Pertuan Agong and those who hold office in the public service of each State hold office, on the other hand, during the pleasure of the Ruler of the State as the case may be.

Holders of the said public offices enjoy special protection through the Federal Constitution as conferred by its Article 135 which provides that, no holder of such office, subject to legislation or subsidiary legislation enacted for carrying out such protection, shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard nor shall he be so dismissed or reduced in rank by any authority subordinate to that other authority which has power to appoint him. There are, of course, rules of disciplinary procedure provided for the purpose.

We pause here to emphasize that such protection is special, because, in an ordinary contract of employment or personal service, an employee need not necessarily be given a reasonable opportunity of being heard before such dismissal or reduction in rank because such an employee cannot ordinarily in law compel his employer to reinstate him to his former job and therefore exercising a right of being heard is an exercise in futility in so far as it is sought to prevent such dismissal.

Examples of dismissal of holders of such public offices, are *Mahan Singh v. Govemment of Malaysia* [1978] 2 MLJ 133, concerning a Punjabi interpreter in the public service of the Federation, B *Surinder Singh Kanda, supra* concerning an Inspector of Police; and a host of other similar cases concerning holders of such public offices.

We may just as well mention that these public offices are more than just jobs. The special protection under the modern view is for trying to preserve as far as possible the independence of the holders of these public offices against victimization by their superior officers or their political masters. See e.g. Malaysian Current Law Journal's *"Federal Constitution of Malaysia – A Commentary"* 1986 Edn. at pp. 394, 395. In olden days, such a public office conferring such a status of being protected by law was looked upon as a form of property, and in this connection, we set out below a passage from Professor Wade's, *"Administrative Law"* 7th Edn. at p. 557, dealing with the difference between a public office and a mere job as follows:

> A line has to be drawn between an office which gives its holder a status which the law will protect specifically, on the one hand, and, on the other hand, a mere employment under a contract of service. Offices used in old times to be looked upon as a form of property which could be held and recovered in specie: if the holder was wrongfully removed he could obtain restoration by *mandamus*; or he might be granted prohibition or an injunction. Nowadays he can also obtain a declaration that his removal was void, and that he is therefore still in office, as was done in *Ridge v. Baldwin*, since this remedy likewise operates specifically. In other words, he is removable only by a due and lawful exercise of the power of removal, failing which he remains legally in office. A servant under a mere contract of service enjoys no such protection, according to a long-established rule of law: whatever his contractual rights, he can always be dismissed and his remedy lies in damages for breach of contract. In other words, there is always a power to dismiss him, even though under the contract there is no right to do so. The principle is that one man will not be compelled to employ another against his will.

The special protection given by the Federal Constitution to such holders, is in addition to a protection of the Court which requires sufficient compliance, not only with the right to be heard but also with the other rule of natural justice

i.e. the rule against bias. In this connection, we remind ourselves of the statement of the veritably eminent Lord Diplock in *Ong Ah Chuan v. Public Prosecutor* [1981] 1 MLJ 64, 71, that in a constitution based on Westminister model, references to "law" refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England.

If the dismissal of a holder of such public office is not sufficiently carried out in accordance with the rules of natural justice and the dismissal or disciplinary procedure enacted therefor, then the dismissal is ineffective or void. Logically, the post from which he has been purportedly removed remains intact for him and he therefore continues in office. In effect, from his employer's point of view, he is reinstated to his former post. The declarations commonly sought in Court in connection with such dismissal are that his dismissal is void, that he continues in office, and that he is entitled to arrears of salary, etc. If he succeeds in Court with such declarations, he obtains reinstatement, a word which learned Counsel in this case and others are wont to shy away as if it were repugnant. We think also that in the case of the holders of these offices, it is perfectly in order.

In the instant case, the Supervisor has been or was undoubtedly an employee of a Local Council. It was the Local Council that sent the letter of offer dated 11 March 1983 offering to him the post in question on its own behalf. It has never been disputed this letter contained the terms and conditions of a contract of service which were unconditionaly accepted by the Supervisor.

Employees of local authorities are not holders of public offices holding office during the pleasure of the Yang Di-Pertuan Agong or the Ruler of any particular state as the case be as, they are not under any category under Art. 132 of the Federal Constitution except any employee in any local authority seconded from State Government or the Federal Government. In general, the employees of local authorities are employed purely on contract basis.

The Supreme Court in *Quek Chek Yen v. Majlis Daerah Kulai* [1986] 2 MLJ 290, 292, quoted with approval, *Halsbury's Laws of England* 4th Edn., Vol. 16 at p. 369 about employees of local authorities:

> Officers of local authorities are appointed on such reasonable terms and conditions as the authority thinks fit. Employees of national corporations are not in the position of civil servants and do not hold office at the pleasure of the Crown.

We now revert to consider the other inevitable aspect of this case, i.e. the terms and conditions on which the Supervisor held his post, *vide* letter of offer dated 11 March 1983 from Pejabat Majlis Daerah and addressed to him. For

the purpose of determining the relief of reinstatement, (the only subject matter of the application to strike out the statement of claim), it would only be necessary, for the time being, to refer to para. 2(e) of the said letter which reads as follows:

> (e) Tuan/puan adalah setiap masa tertakluk kepada Perintah-Perintah Am Kerajaan, Pekeliling-Pekeliling dan lain-lain Arahan Pentadbiran yang dikeluarkan dari masa ke semasa mengenai kerja, kelakuan dan syarat-syarat perkhidmatan pegawai-pegawai dalam perkhidmatan awam;

It is clear that the Supervisor's employment was subject to the General Orders etc., and that the words "Perintah Am Kerajaan ... mengenai kerja, kelakuan dan syarat-syarat perkhidmatan pegawai-pegawai dalam perkhidmatan awam", mean that the General Orders of the Government concerning the work, conduct and conditions of service of officers in the civil or public service. One takes note of the capital letters used in the words "General Orders". All holders of those public offices in the public service of the Federal or State Government, known popularly as government servants, know and have heard of "General Orders" which refer, of course, in connection with disciplinary matters, to "Public Officers (Conduct and Discipline)" (Chapter D) General Orders 1980, which, though replaced now by some other similar regulations, would still apply to the present appeal. The General Orders Cap. D were made expressly by the Yang di-Pertuan Agong in pursuance of power conferred by cl. (2) of Art. 132 of the Federal Constitution. It is common ground that the letter of offer of appointment refers expressly in fact to such General Orders, Cap. D.

The General Orders Cap. D were designed to give substance to the traditional degree of security of tenure to such holders of public offices who hold office during the pleasure of the Yang di-Pertuan Agong or the relevant Ruler in respect of any conduct of the holder considered to be misconduct by the body that appointed him. Even though the said Supervisor was not such a holder of a public office as explained earlier, the General Orders Chapter D had been incorporated into the contract of service of the Supervisor with the Local Council, and the question then arises as to what would be the position regarding the said incorporation.

In our view, the position is that the incorporation of such General Orders Cap. D into the Supervisor's contract of service does not have the legal effect of making him a holder of any of such public office as categorized under Art. 132 of the Federal Constitution. Let us consider this from several angles.

Two parties to a contract cannot confer on either of themselves, to be legally acceptable, a specific, statutory status, provided by a statute, in this case, Art. 132 of the Federal Constitution, the supreme statute. To contract out of

statute, normally means, to waive a benefit conferred by a statute on one of the parties to a contract and this is permissible, given certain circumstances which it would not be necessary in this case, to go into. In the present context, that the Supervisor has no such benefit under any statute to waive is beyond doubt. To argue that the parties have contracted out of statute would have been a non-starter in this case.

Further, when the rights of the parties are regulated or governed by an ordinary contract of employment, the employee not being a holder of public office, or where such rights are not modified or affected by any provisions of any statute, then, the fact that the dismissal of the employee is not in accordance with the procedure laid down in the contract does not prevent the dismissal from being effective to terminate the contract and the only remedy lies in damages. The employee cannot, in these circumstances, claim that the dismissal is void. A case in point for such modification by statute is *Vine v. National Dock Labour Board* [1957] AC 488 HL, in which a dock labourer, registered under a scheme embodied in the Schedule to the Dock Workers (Regulation of Employment) Order 1947 made under the Dock Workers (Regulation of Employment) Act 1946 of the United Kingdom, was sacked by the National Dock Labour Board and his appeal to a tribunal set up under the Act was dismissed. He sued in Court, *inter alia*, for a declaration that his dismissal was invalid or void. The House of Lords held on the facts and the statutory provisions contained in the said Act, that his dismissal was not valid; that his name was not validly removed from the register and that he continued in the employ of the National Dock Labour Board (despite the fact that the successful plaintiff there was not a holder of public office holding office during the pleasure of the Crown). The case was later expressly distinguished however in *Barber v. Manchester Regional Hospital Board* [1958] 1 All ER 323 in which the plaintiff was a medical consultant, serving under a regional hospital board under the National Health Service Act 1946. He was dismissed wrongfully, in breach of such contractual obligations towards him and his appeal to the Minister was refused. He sued for, *inter alia*, a declaration that his employment had never been terminated and he was entitled to his salary up to the date of the writ. It was held, *inter alia*, that the contract between the plaintiff there and the Board was, in essence, an ordinary contract between master and servant and the plaintiffs remedy was only in damages. His claim for the declaration stated above was not allowed.

A clear distinction has to be made between a declaration that a dismissal is invalid and void on the one hand and on the other hand, a declaration that the dismissal is wrongful. The first-mentioned declaration may be granted by the Court with what in effect is a reinstatement, i.e., that he continues in the employ etc. The secondly mentioned declaration is invariably granted with an

order for damages only by virtue of the said principle. When a dismissal is merely wrongful, at some risk of repetition, a plaintiff is left only with a remedy in damages by virtue of the said principle. When a dismissal is void, or invalid, the dismissal that took place earlier never in effect, effectively took place because it is void, so the old job continues. To see things in their better perspective, let us say that a void or invalid dismissal is always wrongful, but not every wrongful dismissal is an invalid or void dismissal.

We may just as well add that by way of further clarification that by virtue of the said principle, an ordinary contract of employment as stated earlier above constitutes an exception to or a departure from the rule that a repudiation of a contract is not effective until the innocent party accepts the repudiation, in connection with which, it should bring to mind the well-known dictum of Asquith LJ in *Howard v. Pickford Tool Co.* [1951] 1 KB 417, 421, that "an unaccepted repudiation is a thing writ in water ...", to deny its existence as an exception in this regard and to attempt at the same time to rationalize such denial would only bring about uncertainty in the law.

In other words, the claim for reinstatement available to a permitted claimant in an Industrial Court or to a holder of a public office as categorized under Art. 132 of the Federal Constitution is therefore not available to the Supervisor. The said principle applies, and he is entitled to claim damages only if he can establish that his dismissal is in breach of his contract of service. The non-observance or non-compliance of such General Orders, Cap. D in the case of the Supervisor herein, is, equivalent to a breach of condition of the contract of personal service of the Supervisor, the condition being the use of such General Orders.

Before coming to the conclusion that the said principle applies to the Supervisor, we have already considered with care as to whether we should treat the Supervisor's case as another exception, (apart from the two exceptions aforesaid) to the said principle explained earlier.

We feel that the policy of the law behind the said principle is still very sound, that a person has the liberty to work for anybody he wishes without being compelled to do so, a liberty in any true democracy. Further it is desirable that an employer, if he has no confidence in an employee, should not be compelled to employ or continue to employ him subject, of course, to the two exceptions aforesaid.

Now, if a workman or employee is aggrieved and seeking reinstatement, he does not have to face a cul-de-sac on his way to seeking such a reinstatement, he can try his luck in getting to the Industrial Court.

By adhering to the said principle, it will continue to remain clear and to guide the legal profession and justify its hallowed place in law, a place it has occupied undisturbed for countless years. It, incidentally, has been confirmed by statute again in the United Kingdom by s. 236 of the Trade Union and Labour Relations (Consolidation) Act 1992 which provides that no Court shall compel an employee to do any work by ordering specific performance of a contract of employment or by restraining the breach of such a contract by injunction. Even in the field of statutory intervention in changing common law to take account of changing industrial conditions and trade unionism, ss. 69 - 71 of Employment Protection (Consolidation) Act 1978 of the United Kingdom provide in effect, that if an order of reinstatement made by the relevant employment tribunal is not complied with, the employer can, in the last resort, only be ordered to pay compensation.

In a contract to provide services as distinct from a contract of personal service, more flexible rules apply. Thus a contract to build may be specifically enforced, if certain conditions are met. The distinction between a contract of personal service and a contract to provide services may one day be dealt with by this Court, though it is not necessary to do so here.

In view of what has been said above, the objection of learned Counsel to the effect that the Supervisor could not claim the declarations that his dismissal was void and that he continued in office is correct and it was therefore correctly accepted by the learned Judge, who held, equally correctly, with respect, that it was not possible for the Supervisor herein to obtain reinstatement.

We are however of the opinion, that in regard to the "preliminary objection", there was no prior express agreement by the parties herein at the time it was raised that it would conclusively decide the whole case one way or another. That being so, in the context of issues in this case, and in view of the express relief sought in the statement of claim, in particular, the claim for damages for wrongful dismissal, we think that the Court below has gone too far in dismissing wholly the claim of the Supervisor.

We therefore allow this appeal, set aside the order of the Court below, and dismiss the summon in chambers dated 5 November 1990 for striking out the statement of claim. We further order that the action herein be fixed for an early hearing to determine whether the appellant's dismissal was wrongful or improper and if so, to assess damages, if any. We make no order as to costs here and below. The deposit of RM500 in Court is to be refunded to the appellant.

Reported by WA Sharif